

The Role of the Prosecutor

*Does Obligation + Responsibility + Duty =
Ethics?*

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UPC Basic Prosecutor - 2016

- **Obligation** - an act or course of action to which a person is morally or legally bound
- **Duty** - a task or action that someone is required to perform
- **Responsibility** - the state or fact of having a duty to deal with something or of having control over someone

As you will see, these terms are often used interchangeably when referring to “Prosecutor Ethics” – is it necessary to distinguish among those terms?

US Department of Justice

Memorandum for Department Prosecutors

The discovery **obligations** of federal prosecutors are generally established by Federal Rules of Criminal Procedure 16 and 26.2, 18 U.S.C. §3500 (the Jencks Act), Brady v. Maryland, 373 U.S. 83 (1963), and Giglio v. United States, 405 U.S. 150 (1972).

ABA Standard 3-1.2

The Function of the Prosecutor

(c) The **duty** of the prosecutor is to seek justice, not merely to convict.

(e) It is the **duty** of the prosecutor to know and be guided by the standards of professional conduct as defined by applicable professional traditions, ethical codes, and law in the prosecutor's jurisdiction.

Utah Rules of Professional Conduct

Rule 3.8 Special **Responsibilities** of a Prosecutor

The prosecutor in a criminal case shall:

- (a) Refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) Make reasonable efforts to ensure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) Not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- (d) Make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and
- (e) Exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.

Is Ethics really in the eye of the beholder?

*The (Prosecutor) is the representative not of an ordinary party to a controversy, but of a sovereignty whose **obligation** to govern impartially is as compelling as its **obligation** to govern at all, and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his **duty** to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.*

Case Name?

Case Name? **Berger v. United States**
295 US 78 (1935)

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Author?

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Author? **Justice George Sutherland**

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Local Significance?

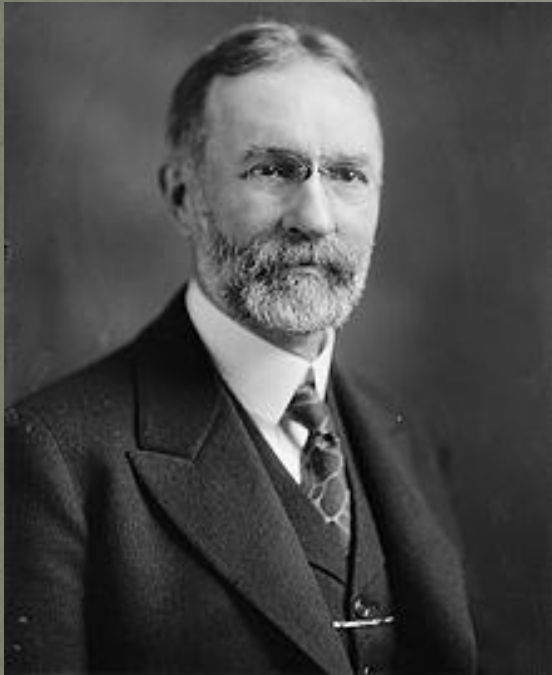
Case Name? **Berger v. United States**
295 US 78 (1935)

Author? **Justice George Sutherland**

Local Significance? **Only United States**
Supreme Court Justice
from Utah

Alexander George Sutherland

(1862 – 1942)



Associate Justice of the Supreme Court of the United States

In office

September 5, 1922 – January 17, 1938 ^U

Nominated by

Warren G. Harding

Preceded by

John Clarke

Succeeded by

Stanley Reed

[United States Senator](#)

from [Utah](#)

In office

March 4, 1905 – March 4, 1917

Preceded by

Thomas Kearns

Succeeded by

William King

Member of the [U.S. House of Representatives](#)

from [Utah's At-large](#) district

In office

March 4, 1901 – March 3, 1903

Preceded by

William King

Succeeded by

Joseph Howell

Personal details

Born	(1862-03-25)March 25, 1862 Stony Stratford, United Kingdom
Died	July 18, 1942(1942-07-18) (aged 80) Stockbridge, Massachusetts
Political party	Liberal Party (1870–1896)) Republican (1896–1942)
Spouse(s)	Rosamond Lee
Children	Edith Emma Philip
Alma mater	Brigham Young University University of Michigan,
Religion	Episcopalian

Discovery

Fundamental to criminal jurisprudence in the presumption of innocence, the right to confrontation and the requirement that guilt be proven beyond a reasonable doubt.

Implicit in those fundamental rights is the government's **obligation** to disclose its evidence to defense (through the process of “discovery”)

Discovery, Rule 16 and *Brady/Giglio*

Not So Rhetorical Question #1

Is there a difference between “evidence known to the prosecutor that tends to negate the guilt of the accused” (Rule 16) and “evidence favorable to an accused”(*Brady*)?

Stated differently, is the duty to disclose under *Brady* greater than the duty under Rule 16?

(See *State v. Draper-Roberts*, 2016 Ut App 151)

The term "Brady violation" is sometimes used to refer to any breach of the broad obligation to disclose exculpatory evidence – that is, to any suppression of so-called "Brady material" – although, strictly speaking, there is never a real "Brady violation" unless the nondisclosure was so serious that there is a **reasonable probability** that the suppressed evidence would have produced a different verdict. There are three components of a true Brady violation: (1) The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) that evidence must have been suppressed by the State, either willfully or inadvertently; and (3) prejudice must have ensued, i.e. the evidence suppressed must be "material to the defendant's guilt or punishment." Evidence is "material" when "there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different."

A reasonable probability does not mean that the defendant "would more likely than not have received a different verdict with the evidence," only that the likelihood of a different result is great enough to "undermine[] confidence in the outcome of the trial." *Kyles v. Whitley*, 514 U. S. 419, 434, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995) (internal quotation marks omitted). See also *Smith v. Cain*, 565 US ___, 132 S. Ct. 627 (2012).

What *Brady* is and what *Brady* isn't

- Brady v. Maryland held “that the suppression of evidence by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”
- Period. The End. *Es todo.*

United States v. Giglio, 405 US 150 (1972)

This case stands for the proposition that when the witness testimony is critical or essential to establish guilt, information affecting the credibility of that witness must be disclosed. In **Giglio**, where testimony from the witness Taliento was essential to conviction, it was a violation of due process not to disclose to defendant that Taliento had been promised immunity in exchange for his testimony

What *Giglio* is and what *Giglio* isn't

While it is hard to find a holding in this case, the Court states from other precedent “when the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility” is required under *Brady*. But only if the testimony “could . . . in any reasonable likelihood have affected the judgment of the jury” *Id* at 154.

Giglio does not mandate disclosure of all bad stuff about the witness.

Brady-Giglio Summary

As a Utah prosecutor, you have:

An **obligation** to disclose evidence to the defense

A **responsibility** to fully disclose

A **duty** to timely disclose

Source: Brady v. Maryland, U.S. v. Giglio, Utah Rules of Criminal Procedure, Rule 16, Utah Rule of Professional Conduct, Rule 3.8

In the Matter of Tyler James Larsen v. Utah State Bar, 2016 UT 26

Larsen's argument conflates the *Brady* standard with the prosecutor's ethical duty under rule 3.8(d). But the two standards are distinct. The question under *Brady* is a matter of due process—of whether the prosecution's failure to disclose exculpatory material so undermines our confidence in the verdict that we should order a new trial. If the exculpatory evidence in question is disclosed during trial, there may be no prejudice and thus no need for a new trial.

In the Matter of Tyler James Larsen v. Utah State Bar, 2016 UT 26

But rule 3.8(d)'s focus is different. It is aimed not only at assuring a fair trial—by articulating a standard for a motion for a new one—but also at establishing an ethical duty that will avoid the problem in the first place. In stating that duty, our rule requires “timely disclosure” by the prosecution. That duty cannot be fulfilled by a prosecutor’s mere admission of the existence of exculpatory evidence made after a witness first uncovers it.

BREAK

Dealing with Represented and Unrepresented Persons

Your first encounter with an Accused will be in person at the arraignment (or first appearance in Class A or Felony cases)

General rule of thumb –



Once you learn that a person is represented by counsel, communicate only with counsel.

URPC Rule 4.2

(a) *General Rule.* In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer.

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Unrepresented Persons

URPC 4.3 and 3.8

General Rule – Don't give legal advice, other than the advice to secure counsel (URPC 4.3).

Special Rule – Do not seek to obtain from unrepresented accused a waiver of important pretrial rights, such as the right to preliminary hearing (URPC 3.8.c).

When in doubt, get your judge involved.

Summary of Dealing with Persons Represented or Not

As a Utah Prosecutor, you have:

An **Obligation** to talk to Defendants

A **Responsibility** to talk to them a little

A **Duty** not to talk to them too much without counsel present or a waiver of same.

TIME OUT

Prosecutor Error VS. Prosecutor Misconduct

Prosecutors are people – people make mistakes. Cops, judges and most defense attorneys are people, too. Not all mistakes made during trial are going to be “misconduct”

For purposes of this presentation, we will distinguish mistakes at trial as “prosecutor error”

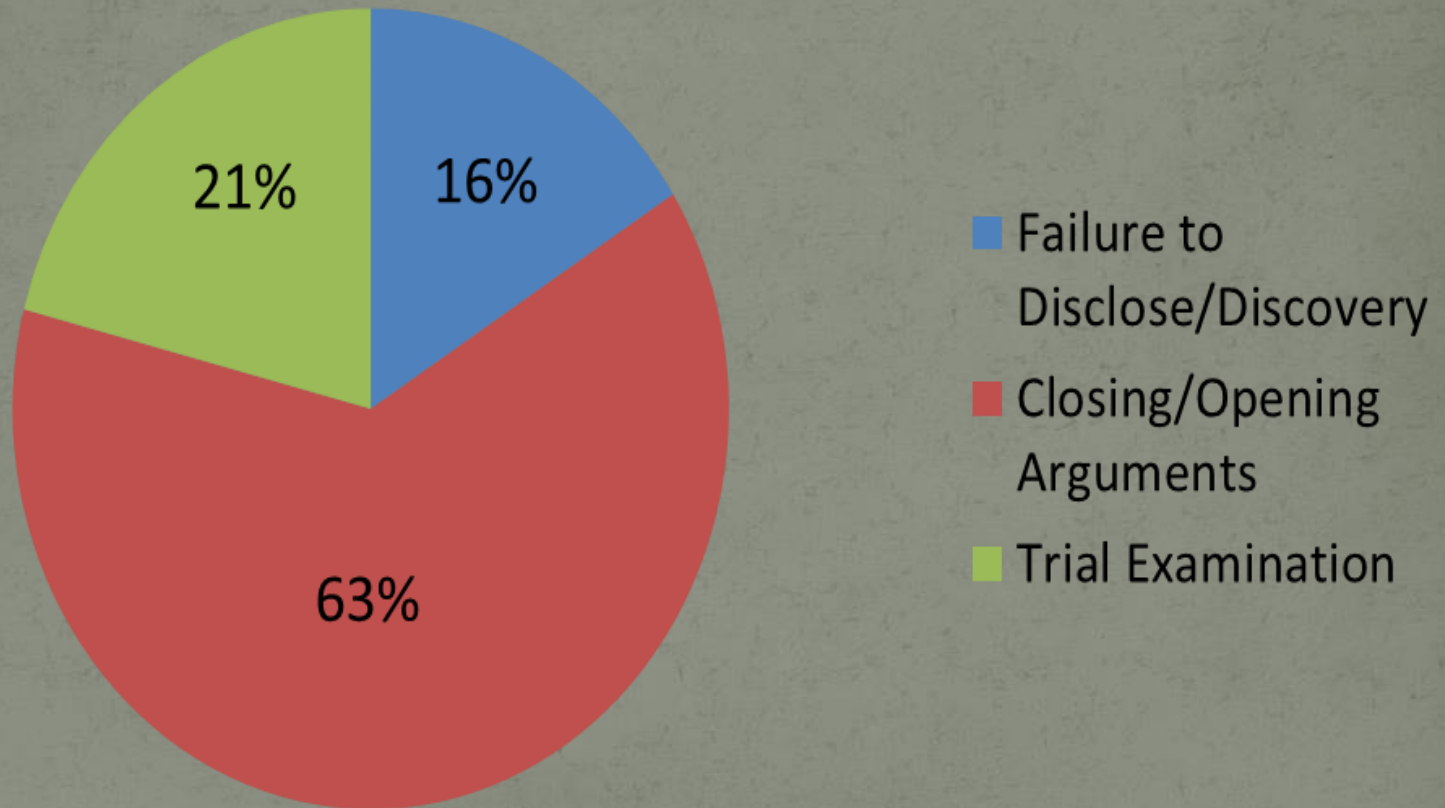
Prosecutor Error VS. Prosecutor Misconduct

Included in your handout materials is an anthology of Utah cases since 1980 which cite and summarize the appellate decisions regarding mistakes made at trial by prosecutors. (Note: appreciation to Thomas Kelley, 2L law clerk extraordinaire, for compiling this digest)

Here are some mistakes which may be avoidable:

- 1) DON'T, during closing arguments, refer to the defendant's arguments as "red herrings." See State v. Campos, 2013 UT App 213, 309 P.3d 1160
- 2) DON'T, during closing arguments, play on the jury's sympathies by arguing that the defendant took advantage of a "vulnerable victim." See 377State v. Jok, 2015 UT App 90, 348 P.3d 385
- 3) DON'T, during closing arguments, tell the jury they should "send a message" to other criminals by convicting the defendant. See State v. Andreason, 718 P.2d 400 (Utah 1986)
- 4) DON'T, during witness examination, continue to ask the same questions that were just objected to and sustained. See State v. Span, 819 P.2d 329 (Utah 1991)

Percentage of Utah Cases Addressing Prosecutor Error (1980-Present)



Error v. Misconduct

As you can see when you review the list, some mistakes are harmless, some are not:

With respect to the comments during the guilt phase, defendant argues the stories told by the prosecutor "drew the jurors' attention to a multitude of facts which were not in evidence, subject to confrontation, or proper for their consideration in reaching a verdict." While it is true that a prosecutor is not permitted in a closing argument to allude "to matters not introduced as evidence at trial," the statements at issue in this case were offered not as new factual matter, but simply as illustrations to make a conceptual point. *State v. Young*, 853 P.2d 327, 349 (Utah 1993). The accuracy of the prosecutor's anecdotes was not at issue; nor were they offered to introduce new evidence to the jury. Although perhaps ill-advised because of its personal nature, the prosecutor's narrative did not constitute misconduct or result in plain error. *State v. Kell*, 2002 UT 106

Misconduct tends to follow you around forever . . .





The Freddie Grey Case – Baltimore, MD

April 19, 2015, 25 y/o Freddie Grey died from injuries sustained on April 12 while in police custody

April 30, Asst Medical Examiner Carol H Allan in her autopsy report stated “the death is best certified as Homicide.”

May 1, six Baltimore police officers involved in the Grey apprehension are charged with multiple offenses including manslaughter and murder.

July 27, 2016 following three separate trials resulting in two acquittals and a hung jury, all pending charges are dropped at a press conference where Baltimore City prosecutor Marilyn Mosby who calls for “real substantive reforms to criminal justice system”



INTERMEZZO

Prosecutor/Victim Relations

Only the State and the defendant are actual parties to a criminal action. *State v. Lane*, 2009 UT 35

Victim may seek appellate review of an adverse ruling from the trial court regarding a violation of the Victims' Rights Act. *State v. Casey*, 2002 UT 29

Prosecutor/Victim Relations

Prosecutors have certain obligations and responsibilities regarding victims of crime as a result of the 1994 constitutional amendments. These can be found in Utah Code Ann. Title 77, Chapter 38 Rights of Crime Victims Act and Chapter 38a Crime Victims Restitution Act

What, if any, ethical duty does a prosecutor owe to Crime Victims beyond the legal responsibilities of those two Chapters?

Moreover, how does one navigate the URPC with Crime Victims who are witnesses in our case but also represented by counsel?

PAUSE . . .

QUESTIONS?

THE END